STATE OF MICHIGAN

COURT OF APPEALS

SUSAN FOWLER,

Plaintiff-Appellant,

v

DETROIT SYMPHONY ORCHESTRA, INC. d/b/a MAX M. FISHER MUSIC CENTER,

Defendant/Third-Party Plaintiff-Appellee/Cross-Appellee,

v

DIAMOND AND SCHMITT ARCHITECTS, INC.,

Third-Party Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
March 12, 2009

No. 282978
Wayne Circuit Court
LC No. 05-535724-NO

Before: Jansen, P.J., and Borrello and Stephens, JJ.

PER CURIAM.

In this premises liability action, plaintiff Susan Fowler appeals as of right the trial court order granting summary disposition to defendant Detroit Symphony Orchestra, Inc. (DSO) under MCR 2.116(C)(10). Third-party defendant Diamond and Schmitt Architects, Inc. (Diamond & Schmitt) cross-appeals the trial court's orders granting third-party plaintiff DSO's motion for summary disposition of its contractual indemnification claim under MCR 2.116(C)(10), requiring third-party defendant to indemnify third-party plaintiff in the amount of $7,800, and denying third-party defendant's motion for case evaluation sanctions under MCR 2.403(O). For the reasons set forth in this opinion, we affirm, in part, reverse, in part, and remand for proceedings consistent with this opinion.

I. Facts and Procedural History

On May 28, 2005, plaintiff and her husband attended a performance at the Max M. Fisher Music Center, which is owned and operated by the DSO. As the couple was leaving the facility after the performance, plaintiff slipped on the top step of the staircase and fell down the stairs, injuring her arm, shoulder and head. On December 15, 2005, plaintiff filed suit against the DSO.

Her first amended complaint contained claims of general negligence and claims that the premises were defective in that the stairway was unreasonably dangerous and that the handrail violated the building code and was not graspable. Both the stairway and handrail were designed by Diamond & Schmitt pursuant to a contract between the DSO and Diamond & Schmitt under which Diamond & Schmitt served as design architect for a "Hall Expansion Program," which was an addition to the Detroit Symphony Orchestra Hall. On December 4, 2006, the DSO filed a third-party complaint against Diamond & Schmitt. The DSO's first amended third-party complaint against Diamond & Schmitt contained claims for express and implied contractual indemnity, as well as common law indemnity.

On April 17, 2007, case evaluation occurred, and the panel unanimously awarded plaintiff $50,000 against the DSO and awarded the DSO $25,000 against Diamond & Schmitt. Regarding the $25,000 award, the record indicates that Diamond & Schmitt accepted the case evaluation, but that the DSO made a "limited acceptance" under MCR 2.403(L)(3)(b).[1]

In June 2007, DSO moved for summary disposition of plaintiff's claims under MCR 2.116(C)(10). DSO argued that it was not liable for plaintiff's slip and fall because plaintiff proffered no evidence that DSO either caused the presence of a liquid on the staircase or had actual or constructive knowledge that any liquid was present on the stairs. DSO also argued that the design of the staircase presented an open and obvious condition and that it did not have any special aspects that presented an unreasonable risk of harm. DSO further argued that the handrail complied with building code standards, but that even if it did not comply with the building code, Diamond & Schmitt was responsible for building code compliance, and under DSO's contract with Diamond & Schmitt, Diamond & Schmitt was obligated to indemnify DSO for any claims caused by their negligence or any negligence on the part of their subcontractors.

On July 16, 2007, the trial court granted DSO's motion for summary disposition of plaintiff's claims. The trial court's ruling hinged not on the open and obvious doctrine, but on whether a dangerous condition existed at all. According to the trial court, there was no evidence that any liquid was present on the staircase and no evidence regarding the color of any alleged liquid, the size of any pool of liquid or the duration that any liquid was allegedly present on the staircase. Regarding the handrail, the trial court held that plaintiff did not attempt to use the handrail before she fell, that the handrail was not the proximate cause of plaintiff's fall, and that plaintiff's argument that she would have been able to stop herself from falling but for the diameter of the handrail was speculative. Although the trial court observed that because plaintiff did not use the handrail, it did not matter if the handrail complied with the building code, the trial court nevertheless concluded that the handrail was "graspable" and complied with the building code. For all these reasons, the trial court granted DSO's motion for summary disposition.

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[1] MCR 2.403(L)(3)(c) provides that "[i]f a party makes a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept."

DSO also moved for summary disposition of its indemnification claim against Diamond & Schmitt under MCR 2.116(C)(10). According to DSO, the contract between DSO and Diamond & Schmitt contained an express contractual indemnification provision, and DSO was entitled to indemnification based on that provision. The trial court granted DSO's motion for indemnification from Diamond & Schmitt as to plaintiff's claim regarding the handrail. In granting DSO's motion, the trial court considered the express language in the indemnification provision of the contract between DSO and Diamond and Schmitt and concluded that the indemnification provision in the contract was triggered because plaintiff claimed liability against DSO based on Diamond & Schmitt's negligence.

On September 21, 2007, Diamond & Schmitt moved for case evaluation sanctions in the amount of $16,420 under MCR 2.403(O)(1) against DSO based on DSO's rejection of the case evaluation award. Diamond & Schmitt argued that they were entitled to case evaluation sanctions because DSO rejected the case evaluation award of $25,000 in favor of it and against Diamond & Schmitt, and the verdict was less favorable to DSO than the $25,000 case evaluation award. The trial court denied Diamond & Schmitt's motion for case evaluation sanctions.

On December 18, 2007, the trial court entered an order awarding DSO indemnification of $7,800 from Diamond & Schmitt and closing the case.

II. Standard of Review

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

The interpretation of a contract is a question of law that this Court reviews de novo. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

A trial court's decision to grant or deny case evaluation sanctions under MCR 2.403(O) is also a question of law that this Court reviews de novo. *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003).

III. Law and Analysis

A. Plaintiff's Appeal

Plaintiff argues that the trial court erred in granting defendant Detroit Symphony Orchestra's motion for summary disposition. According to plaintiff, there was a genuine issue of material fact regarding whether defendant had actual or constructive knowledge of the existence or potential existence of a spilled liquid at the top of the staircase. Plaintiff also argues that the trial court erred in ruling that the handrail met building code standards.

To establish a prima facie case of negligence, a plaintiff must prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached the duty, (3) the defendant's breach of duty was the cause in fact and proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a landowner's duty to an invitee "does not generally encompass removal of open and obvious dangers[.]" *Id.* To sustain a premises liability action, a plaintiff must show that the defendant or its employees caused the unsafe condition or that the defendant knew or should have known of the unsafe condition. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Constructive notice can be inferred from evidence that the condition is of such a character or has existed a sufficient length of time that defendant should have had knowledge of it. *Id.*

Plaintiff argues that the liquid at the top of the staircase could have come from a drink sold by defendant during intermission. According to plaintiff, defendant knew that patrons would carry drinks up and down the stairs and should have known that these drinks would be spilled, yet failed to have a janitorial policy in place regarding clean up of such spills. Plaintiff's argument regarding the source of the alleged liquid is speculative. A party opposing a motion for summary disposition must present more than conjecture and speculation to satisfy its burden of showing that a genuine issue of material fact exists. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). Mere conclusory allegations are insufficient to demonstrate the existence of a genuine issue of material fact for trial. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

Furthermore, plaintiff failed to present competent evidence from which it could be inferred that defendant had actual or constructive notice of the existence of a dangerous or hazardous condition. In her deposition, plaintiff admitted that she did not see any liquid at the top of the steps and that nobody told her they saw liquid where she slipped. She further admitted that she could not say what color the liquid was, where the liquid came from or for how long the liquid had been present before she slipped on it and fell. Without evidence indicating the presence of a liquid on the top step, plaintiff's claim that there was liquid on the top step was mere speculation without a factual foundation. *Karbel*, *supra* at 97. Furthermore, plaintiff offered no evidence that the liquid, if it was present on the top of the stairway, was present for a

sufficient amount of time to put defendant on notice. *Clark*, *supra* at 419. Because plaintiff failed to create a genuine issue of material fact regarding whether defendant had actual or constructive notice of a liquid at the top of the stairway, she cannot maintain her stairway based premises liability claim against defendant, and the trial court properly granted defendant's motion for summary disposition.

We next address plaintiff's claim that the trial court erred in concluding that the handrail complied with the building code. It is true that the trial court concluded that the handrail satisfied the building code. However, we need not determine the propriety of the trial court's ruling in this regard because, as the trial court correctly noted, plaintiff did not use the handrail when she began her descent of the stairs:

> The reason by the way,—let's go to the handrail. The reason—the handrail is totally irrelevant because the reason she tripped is because she didn't use the handrail. A handrail is not a danger, let's start with that. A handrail is a safety device. But it doesn't matter because the plaintiff didn't use it.
>
> It doesn't matter if the handrail was grossly violative of the BOCA code and we'll get to that. It doesn't matter because the plaintiff didn't use the handrail.
>
> * * *
>
> I will say that this unfortunate incident for [plaintiff] shows the prudence of holding onto a handrail no matter how able you are because you—as she did—you might trip on the top step. Unfortunately for her, she chose not to use the handrail and she fell down.
>
> It's not the fault of the architect or the Detroit Symphony Orchestra.

We agree with the trial court's conclusion regarding the irrelevance of the handrail for reasons in addition to those reached by the trial court. In her deposition, plaintiff stated that she began to fall "from the first step, the minute I took the first step down." When asked during her deposition if she was holding the handrail when she stepped down the stairs, plaintiff responded: "Not at the time I stepped down, no." During oral argument, it became clear that plaintiff's argument regarding the handrail was not predicated on the contention that plaintiff attempted to grasp the handrail prior to her fall, but rather that as she fell, plaintiff tried to grasp the handrail and was unable to do so because of the ungraspable nature inherent in the design of the handrail. Counsel for plaintiff was then asked to provide specific citations to her deposition where evidence that plaintiff tried, but was unable, to grasp the handrail could be found. Counsel for plaintiff cited pages of plaintiff's transcript which this Court does not possess. Although excerpts of plaintiff's deposition are included as exhibits to briefs submitted to the trial court and to this Court in some of the parties' (not plaintiff's) appellate briefs, plaintiff's entire deposition is not included in the lower court record or as an exhibit to any of the parties' briefs on appeal. Furthermore, plaintiff has not provided this Court with copies of the specific pages that plaintiff alleged at oral argument contained plaintiff's assertions that she tried to grasp the handrail as she fell, and none of the other parties included copies of those pages as exhibits to their appellate

briefs either. Accordingly, we have nothing in the record before us from which we could conclude that plaintiff ever reached for or attempted to reach for the handrail before or during her fall.

Plaintiff cannot make an assertion of fact without providing this Court with documentary evidence to support it. "We will not search the record for factual support for [a party's] claims." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Thus, the only evidence in the record provided to this Court leads us to the inescapable conclusion that because plaintiff acknowledged that she did not use the handrail when she began to descend the stairs and because plaintiff has not presented this Court with any evidence that she attempted to grasp the handrail as she was falling, any alleged defective design in the handrail or violation of the building code related to the handrail was not a proximate cause of her fall down the stairs. Proximate cause includes two separate elements: (1) cause in fact, which requires a showing that but for the defendant's conduct, the plaintiff would not have been injured, and (2) legal or proximate cause, which involves examination of the foreseeability of consequences and whether a defendant should be held legally responsible for those consequences. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). "The issue of proximate cause is generally a question of fact[.]" *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000), overruled on other grounds *Grimes v Dep't of Transportation*, 475 Mich 72 (2006). However, if "the facts bearing upon proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts," the issue is a question of law for the court. *Paddock v Tuscola & Saginaw Bay R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997).

In this case, plaintiff contends that if the handrail complied with the building code it might have stopped her from falling further when she attempted to grab it after she began falling. That the handrail *might* have stopped plaintiff from falling further *if* she had attempted used it is conclusory and purely speculative and not sufficient to establish a genuine issue of material fact for trial. *Bennett*, *supra* at 317; *Karbel*, *supra* at 97. Even if the handrail violated the building code, plaintiff admitted that she did not use the handrail as she began to descend the stairs. Thus, any lack of compliance with the building code was not a proximate cause of plaintiff's fall down the stairs. The trial court properly concluded that whether the handrail violated the building code was irrelevant in light of plaintiff's failure to use it.

B. Third-Party Defendant's Cross Appeal

1. Summary Disposition

Diamond & Schmitt argue that the trial court erred in granting summary disposition of DSO's third-party contractual indemnification claim against it.[2] According to Diamond &

[2] The DSO's motion for summary disposition was limited to its claim for contractual indemnification, and the trial court therefore did not make a ruling regarding common law indemnification. We observe that summary disposition of DSO's common law indemnification claim also would have been proper because "'[t]he right to common-law indemnification is (continued…)

Schmitt, the trial court's granting of summary disposition was improper and premature because no negligence on the part of Diamond & Schmitt caused plaintiff's injuries, and the unambiguous language in the indemnification provision in the contract required a finding of negligence and causation to trigger Diamond & Schmitt's duty to indemnify.

The contract between DSO and Diamond & Schmitt contained an express indemnification provision. "Where parties have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined from the language of the contract." *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004). Contract interpretation is generally a question of law for the court. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). "An indemnity contract is construed in the same fashion as are contracts generally." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). Where the language in the indemnity provision is clear and unambiguous, interpretation is limited to the actual words used; an unambiguous contract must be enforced according to its terms. *Burkhard v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

The indemnification provision contained in the contract between DSO and Diamond & Schmitt provides, in relevant part:

INDEMNIFICATION

> **12.1** To the fullest extent permitted by applicable law, Architect of Record agrees to indemnify and hold harmless [DSO] . . . for, from and against all liabilities, claims, damages, losses, liens, costs, causes of action, suits, judgments and expenses (including court costs, attorneys' fees, and costs of investigation), of any nature, kind or description of any person or entity, **directly or indirectly arising out of, caused by, or resulting from (in whole or in part), any negligent act or omission of Architect of Record**, any its Subcontractors, anyone directly or indirectly employed by them, or anyone that they control or exercise control over . . . . [Emphasis added.]

The issue in this case involves the scope of the indemnification provision. The trial court interpreted the indemnification provision as applying if an individual merely alleged or claimed that DSO was liable because of Diamond & Schmitt's negligence, stating: "If somebody claims that they're [DSO] liable because of your negligence, which has happened here, you have to indemnify them." According to the language in the indemnification provision, however, Diamond & Schmitt was required to indemnify DSO for any "claims . . . [or] causes of action . . .

(…continued)

based on the equitable principle that where the wrongful act of one party results in another being held liable, the latter party is entitled to restitution.'" *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227; 555 NW2d 180 (1996), quoting *Cameron v Monroe Co Probate Court*, 214 Mich App 681, 689; 543 NW2d 71 (1995). "[W]here there is a specific finding of no negligence, there can be no common-law indemnification." *Id.* at 228. In this case, the trial court specifically found that the fact that plaintiff fell down the steps was "not the fault of the architect[.]" Therefore, DSO was not entitled to common law indemnification.

arising out of, caused by, or resulting from . . . any negligent act or omission of [Diamond and Schmitt.]" The trial court's interpretation of the indemnification provision ignores the plain and clear language in the indemnification provision requiring a "negligent act or omission" on the part of Diamond & Schmitt to trigger the duty to indemnify. The parties could have included a duty to defend provision, but did not do so. The parties also could have provided that Diamond & Schmitt would be required to indemnify DSO for any claims or cause of action caused by any "*alleged* negligent act or omission" of Diamond & Schmitt, but did not do so. Instead, the plain language of the indemnification provision reveals that the indemnification provision was triggered only if there was a "negligent act or omission" on the part of Diamond & Schmitt. In this case, there was no finding of negligence. To the contrary, the trial court explicitly found that plaintiff's fall was "not the fault of the architect[.]" The trial court therefore erred in concluding that the indemnification provision in the parties' contract required Diamond & Schmitt to indemnify DSO.

2. Case Evaluation Sanctions

Diamond & Schmitt argue that the trial court's granting of summary disposition of DSO's motion for summary disposition of its contractual indemnification claim and award of costs and attorney fees related to DSO's defense of plaintiff's claims related to the handrail was less favorable than the $25,000 case evaluation award in favor of DSO and against Diamond & Schmitt and that the trial court therefore erred in denying their motion for case evaluation sanctions under MCR 2.403(O). Our reversal of the trial court's decision regarding whether Diamond & Schmitt had a contractual obligation to indemnify DSO affects whether the verdict was more favorable to DSO than the case evaluation award. We therefore remand for the trial court to reconsider Diamond & Schmitt's motion for sanctions under MCR 2.403(O) in light of our reversal of the trial court's order requiring Diamond & Schmitt to indemnify DSO. On remand, the trial court shall clearly articulate, either on the record or in its order, the reasons for granting or denying Diamond & Schmitt's motion for sanctions.

Affirmed, in part, reversed, in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens